IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 518.

RAIL AND RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, MATTHEW B. HAMMOND AND THOMAS J. DUFFEY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO,
Appellees.

BRIEF OF APPELLEES.

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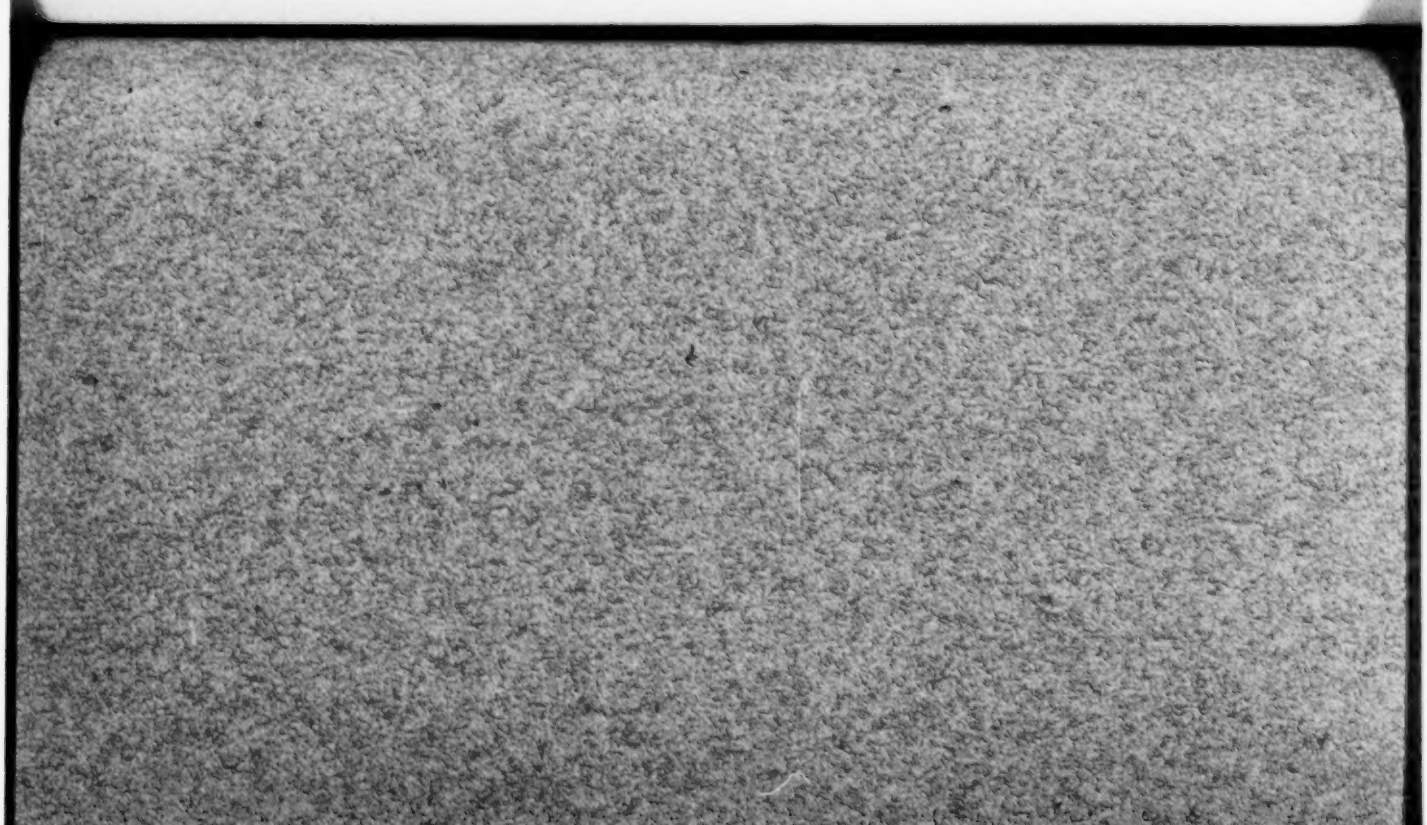

BRIEF OF ARGUMENT AND INDEX OF CITATIONS

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BRIEF OF APPELLEES.

STATEMENT.

The case has been well stated in the brief of appellant.

ARGUMENT.

The Main Object of the Ohio Law and the Principal Means of Accomplishing that Object Embodied Therein, are Unquestionably Within the Police Power of the State, so Far as the Fourteenth Amendment of the Constitution of the United States is Concerned.

Obviously, the primary and controlling purpose of the Ohio act, which is quoted in full at page 12 of the record, is disclosed by Sections 1 and 6 thereof, which, broadly speaking, require that every mine and every loader of coal in any mine in Ohio, who, under the terms of his employment, is to be paid on the basis of weight, shall be paid according to the total weight of all coal contained in the mine car in which the same shall have been removed out of the mine; and that any employer of such miner or loader who passes any part of the contents of the mine car over a screen or other device for the purpose of ascertaining the amount to be paid to such miner or loader, whereby the total weight of the contents of the car shall be reduced or diminished, shall be punished in a certain way. In a word, the law to this extent, so to speak, compels the operators of coal mines to compensate their employes, if paid by weight, on the basis of the entire weight of the product mined; and prohibits the use of any device for the purpose of reducing or diminishing the total weight of the contents of the car, and basing the compensation of the miner on such reduced weight.

To this extent the Ohio statute is practically identical with the Arkansas law, considered by this court in McLean v. Arkansas, 211 U. S., 537. The entire statute involved in that case is quoted in the opinion of Mr. Justice Day at page 543. For our purpose the following abstract thereof is sufficient:

> "It shall be unlawful for any * * * operator of coal mines * * * employing miners at bushel or ton rates, or other quantity, to pass the out-put of coal mined by said miners over any screen or any other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of wages fixed by the laws of Arkansas; * * * and the coal sent to the surface shall be accepted or rejected; and if accepted shall be weighed in accordance with the provisions of this act * * * ."

At a glance it is apparent that in so far as the prohibition of the use of the screen for the purpose of diminishing the weight of the product for which compensation shall be paid, is concerned, and in so far as the compulsory use of the "mine-run" method or basis of compensation of employes, as against any other method based on **weight** or **measure**, is concerned, the Ohio act is the same as the Arkansas law.

In McLean v. Arkansas, **supra**, the constitutionality of the Arkansas law was sustained. We need not quote from the decision of Mr. Justice Day; but as a matter of logic it follows, we think, that the decision itself establishes the rule that as against any of the guarantees of the amendments of the Federal Constitution, a state, exerting its police power, has the right to enact

legislation of this sort, and, correspondingly, to restrain the exercise of the individual's liberty of contract.

McLean v. Arkansas has been frequently cited with approval in more recent opinions of this court. (See Williams v. Arkansas, 217 U. S., 87; Engle v. O'Malley, 219 U. S., 138; C. B. & Q. R. R. Co. v. McGuire, 219 U. S., 569; Quong Wing v. Kirkendall, 223 U. S., 62; Schmidinger v. Chicago, 226 U. S., 589; Barrett v. Indiana, 229 U. S., 29).

It is interesting to note in this immediate connection that Mr. Justice Day in his opinion in the McLean case comments upon facts established in a public inquiry conducted by an industrial commission, authorized by act of Congress. He says at page 549:

> "Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 19, 1898. * * * In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the 'run of mine' system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had let to frequent and sometimes heated controversies between operators and the miners. This condition was testified to have been the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens

had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as basis of paying the miner's wages.

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state."

As the whole opinion shows, the conditions disclosed by the report of the congressional industrial commission do not constitute, in the mind of Mr. Justice Day, the only grounds on which the constitutionality of the Arkansas legislation could be upheld. We call particular attention to this portion of the opinion in the McLean case, however, for the reason that Ohio was not content to rest her legislation upon the results of the official investigation referred to in the opinion in the McLean case. Proceeding with the utmost deliberation, her legislature directed a similar inquiry to be made into the conditions of coal mining in the state (see 103 O. L., 981). Such an investigation was conducted by a commission appointed for that purpose, which made a report to the governor of the state, analyzing the testimony taken by it and recommending specifically the enactment, among other laws, of the very act assailed in this case. Copies of the report, which is known as that of the Ohio Coal Mining Commission, are on file with the clerk of this court; and we shall have occasion to

call particular attention to certain facts found by the commission and set forth therein, in the course of this brief; if the court should desire to make use of the report generally in the consideration of the case, we refer to appellees' memorandum opposing the motion for a restraining order, also on file with the papers, wherein, at pages 10 and 11 thereof, will be found an analysis of the report which may serve as a convenient index to its contents.

In so far, then, as this case involves the power of the State of Ohio, as against the limitations of the Federal Constitution, to enact into law a policy of the kind exemplified in the central and principal features of the legislation now under review as we have hereinbefore described them, we submit, with confidence, that such power is established beyond question by the decision in McLean v. Arkansas. Indeed, careful examination of the able brief of appellant's counsel will disclose that they make a tacit admission, at least, that this is the case, and that if the constitutionality of the Ohio law can be successfully assailed, the attack must be made upon those features thereof which differ from those of the Arkansas law sustained in the McLean case. This is the position to which appellant is driven and counsel have apparently accepted the situation.

Those Features of the Ohio Law in Respect of Which it Differs from the Arkansas Law, viz., the Provisions of the Latter Part of Section 1, and those of Sections 2 to 5 Inclusive and Section 7 of the Ohio Law, do not Violate the Fourteenth Amendment of the Constitution of the United States.

The logic of the situation, as we have attempted to describe it, has sent appellant's counsel, in the effort to find grounds of attack upon the Ohio law, upon a search for **differences** between that and the Arkansas law sustained in the McLean case; and having found such differences, which indubitably exist, they discover, of course, that in the conventional sense, at least, the provisions of the Ohio law in respect of which it differs from the Arkansas law, constitute restraints upon the conduct of individuals. Thereupon they resort to the Fourteenth Amendment of the Federal Constitution, which protects individual rights from undue restraint on the part of the states and assert with vigor that what may be termed the peculiar features of the Ohio law constitute restraints that are violative of the said amendment.

We may remark at this point that one could scarcely expect one police regulation to differ from another, save in respect of some different or additional restraint. For, as pointed out by Professor Freund in his work on Police Power:

> "From the mass of decisions, in which the nature of the power has been discussed * * * it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the public wel-

> fare, and it does so by restraint and compulsion. * * *
>
> The organized activity of the community is based upon the fact of belief that * * * in certain respects, individual activity is anti-social * * *. The state * * * meets the latter by restraint and compulsion, exercised over individuals. * * * No community confines its care of the public welfare to the enforcement of the principles of the common law. The state * * * exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations, which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power."
>
> Freund on Police Power, Secs. 3 and 8.

Although these matters are, of course, elementary, we cannot refrain from adding to Professor Freund's concise and accurate commentary on the **methods** of the police power the statement of Mr. Justice Holmes, speaking for the court, in Noble State Bank v. Haskell, 219 U. S., 104, as to the **extent** of that power:

> "It may be said, in a general way, that the police power extends to all the great public needs. Canfield v. U. S., 167, U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary for the public welfare."

That the Ohio law, then, imposes certain conventional restraints and exerts certain conventional compulsions upon the conduct of individuals, is but natural. No violation of the Fourteenth Amendment of the Federal Constitution follows from the mere fact that restraints are imposed and compulsions exerted. The cases cited

by appellant's counsel on this point establish the principle that in order to show that a state police regulation violates the Fourteenth Amendment of the Federal Constitution its assailant must show, not only that it restrains or compels the conduct of individuals but also that:

1. The purpose of the legislation is one for which the legislative power may not be exerted; or that,

2. The means employed for the accomplishment of the purpose have no real, substantial relation to that purpose, or are arbitrary or unreasonable or beyond the needs of the case.

In other words, the logical burden does not shift to those who would sustain a police regulation when it is shown merely that it embodies restraints and compulsions; the adversary must, in addition, show the lack of power to legislate with reference to the purpose intended to be accomplished, the lack of appropriateness of the means employed to the chosen end, etc.

We have made these elementary observations preliminary to discussing the claims of appellant's counsel with respect to those features of the Ohio law which differ from the Arkansas law; but we think that there are certain considerations which lie in the way of the effort of this appellant to question the Ohio legislation under the Fourteenth Amendment. These considerations, it has seemed to us, should be called to the court's attention at this point. We therefore discuss them subordinately to the main heading last above set forth.

1. Appellant Cannot Object to the Ohio Law on the Ground that it Restrains its Liberty of Contract in Violation of the Fourteenth Amendment.

This court has so many times held that one who claims the protection of the Federal Constitution as against a State law must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution, that we feel that we need not do more than refer to the cases cited by Mr. Justice Pitney in Plymouth Coal Co. v. Pennsylvania, 232 U. S., 532, as authority for this proposition.

One of the principal, **if not the only ground** of appellant's complaint against those features of the Ohio law which distinguish it from the Arkansas law, is that they restrain the liberty of contract. As shown by statements at pages 14 and 15 of appellant's brief it objects to that provision of Sections 1 and 2 which authorizes and requires the Industrial Commission of Ohio to ascertain and determine the percentage of impurities unavoidable in the proper mining or loading of coal in the several operating mines within the state, and to those provisions of Sections 3 to 5 inclusive of the act which requires the Industrial Commission, in the event of failure of employer or employe to agree with reference to the allowable percentage of fine coal in the output of a given mine, to fix on request of either party, what that allowable percentage is, until such time as the parties to the employment shall agree with respect thereto.

As stated, the complaint is that by the operation of these provisions the employer is precluded from agree-

ing with his employes with respect to the standard of purity or fineness of the product for which they shall be paid; or as counsel insists upon putting it, which the operatives shall produce in the mine.

Now the appellant describes itself in its bill of complaint at page 2 of the record as "a corporation organized and existing under the laws of the State of West Virginia".

As we understand the decisions of this court, a corporation has no such attribute or natural right as liberty. We cannot add to what was said by Mr. Justice Harlan for this court in Western Turf Association v. Greensburg, 204 U. S., 361-363:

> "The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law, is the liberty of natural, not artificial, persons."

Therefore, because appellant is an artificial person, and therefore does not possess the attribute of liberty which is guaranteed by the Fourteenth Amendment; and because in order to strike down the state law on the grond of violation of the Fourteenth Amendment, appellant must show itself to be within the class protected by that amendment, which it has failed in this particular to do, we submit, without further discussion or citation of authorities, that the appellant, Rail and River Coal Company, cannot raise the question of deprivation of liberty to make contract, and that, therefore, its bill of complaint, which is the only pleading in the case, does not state facts which suffice to permit the court to consider whether or not the admitted deprivation of liberty of contract which Sections 2 and 3 of the Ohio act and

their corollaries produce is such, with respect to its relation to the object to be attained, as to be violative of the Fourteenth Amendment, and therefore to destroy the validity of the law.

2. The Peculiar Provisions of the Ohio Law do not Affect Property Rights as Such.

We have seen that the Rail and River Coal Company, a corporation, cannot complain of any alleged deprivation of liberty, because it is not a natural person. We now submit that the allegation in the bill, supported by one or two assertions in the brief, that these provisions of the Ohio law constitute a taking of the property of the plaintiff without due process of law is erroneous. Whatever effect these provisions have upon private rights is limited to a deprivation of liberty, i. e., freedom of contract; no property whatever is taken.

In McLean v. Arkansas, **supra**, the claim was made in the brief of counsel for plaintiff in error that the Arkansas law had the effect of taking property without due process of law as well as of depriving persons of their liberty without process. Mr. Justice Day in discussing these questions simply ignored the claim with respect to the taking of property, and throughout his opinion dealt with the question of deprivation of liberty as the only question in the case. Indeed, we fail to see how the property rights of the appellant are in any way affected by the peculiar provisions of the Ohio law except upon the theory that the ownership of a coal mine and the established business of conducting such a mine involve, as proprietary in their nature, the right to make contracts of employment with respect to the production of

the coal and the operation of the business. It is doubtless true that one of the property rights arising out of the ownership of property is the right to dispose of the property or to deal with it as the owner may deem best, subject at all times, of course, to the social interests; but we point out that this act, or to be more specific, the provisions of Sections 2 and 3 thereof, do not in any way affect the right to dispose of the property of the appellant and those whom it represents, or to deal with it as property in any manner in which they may see fit to deal with it. This is surely true with respect to the standard of purity. This standard is fixed solely for the purpose of figuring in the basis of compensation of the employes which is to be fixed by subsequent contract. The operator is not precluded from selling coal of any designated purity nor is he compelled to produce coal of any standard of purity. Some of the reasons for this statement will be hereinafter developed. At present it is sufficient to state again that the sole purpose and effect of Section 2 of the law is to create a standard on the basis of which employes shall be compensated under future contracts, and the property rights of the appellant in its coal and in its business are in no wise affected.

With respect to the provisions of Section 3, the question is perhaps somewhat doubtful. That section requires, in the first instance, the employers and employes to agree upon an allowable percentage of fine coal, and directs the Industrial Commission, on request of either party, and in the event of their failure to agree, to fix such percentage **ad interim**. The section also authorizes the Industrial Commission to make and enforce orders relative to the production of coal at a given mine which

will result in carrying into effect the Commission's determination as to the allowable percentage of fine coal. This section, and particularly the provision thereof last mentioned, might be considered as affecting property rights. The line between personal liberty and rights of property is, we suppose very indistinctly drawn. We are not aware of any decision in which an attempt has been made to distinguish between these two fundamental kinds of rights. The present case may afford opportunity for such distinction; for it is clear, on reasons already stated, that appellant cannot invoke the protection of the Federal Constitution against any invasion of its "liberty"; whereas, we acknowledge that if its property is taken it may claim the protection of that amendment against any unnecessary or arbitrary taking.

We do not deem this point of sufficient importance in the case to justify elaborate discussion, although the field is inviting. It is sufficient for our purpose to call the court's attention to the fact that primarily, at any rate, the effect which the Ohio law exerts is spent upon the liberty of individuals and that property rights, if affected at all, are affected only in an academic sense.

3. Coal Operators, as a Class, Cannot Complain of the Peculiar Features of the Ohio Law Under the Fourteenth Amendment of the Federal Constitution, Because these Features of the Law do not Injure Them.

The third consideration which lies in the way of an attack by appellant and those whom it represents upon the peculiar features of the Ohio law under the Fourteenth Amendment of the Federal Constitution, is

found upon a principle already alluded to, viz., that one who claims the protection of the Federal Constitution as against a state law must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.

Plymouth Coal Company v. Pennsylvania, **Supra**.

In this case the Rail and River Coal Company sues not only as a corporation but also in the capacity of a producer and employer. Its specific complaint under the Federal Constitution is that Sections 2 and 3 of the Ohio law unduly deprive the employers of their liberty to contract with their employes and to manage and control their own property, in that the power vested by these sections in the Industrial Commission to fix standards of fineness and purity precludes the fixing of standards of rejection or standards of quality by private contracts. This, of course, is not strictly true with respect to the percentage of fine coal, which the law expressly makes subject to agreement (Sec. 3). Our position in this connection is, however, that the conventional deprivation of liberty of contract and freedom to manage a private business which these provisions of the Ohio law work is illusory as to the employers. That is, the action which the Industrial Commission is required to take under either of these sections, while in a conventional sense it may be said to remove a given element from the field of private contract to which the employer would be a party cannot possibly work any **injury** to him.

The difficulties of a logical presentation of the case are such that in discussing this question much must be

anticipated and left to more elaborate discussion in a later portion of this brief. For the present, however, our purpose is served by calling the court's attention to the exact language of Section 2 of the act as set forth at page 12 of the record. The section in full is a follows:

> "Section 2. Said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurities **unavoidable in the proper mining** or loading of the contents of mine cars of coal in the several operating mines within this state."

We submit that in the first instance this language imposes a **duty** upon the Industrial Commission rather than a power. The Industrial Commission is not to fix any standard of purity which in its discretion it may deem advisable to fix; it must ascertain and determine something which the law presumes to exist as a fact, viz., the percentage of impurities unavoidable in the proper mining or loading of coal in a given mine.

That the Commission's function consists of the ascertaining of facts rather than the imposition of standards is apparent not only from the language of Section 2 itself, but also from the consideration of other provisions of law which are in **pari materia**. We refer the court to the act of the General Assembly passed March 18, 1913, 103 O. L., 95. This is the law creating the Industrial Commission, by virtue of which it exists and exercises its powers and duties. We refer in particular to the following quoted sections thereof:

> "Section 25. All orders of the Industrial Commission of Ohio in conformity with law shall be in force and shall be prima facie reasonable and lawful; and all such orders shall be valid and in force and prima facie reasonable and lawful until they are

found otherwise in an action brought for that purpose pursuant to the provisions of Section 41 of this act, or until altered or revoked by the Commission."

"Section 27. (1) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the Commission in the manner provided in this act.

(2) Such petition for hearing shall be by verified petition filed with the Commission, setting out specifically and in full detail the order upon which a hearing is desired and every reason which such order is unreasonable or unlawful, and every issue to be considered by the Commission on the hearing. The petitioner shall be deemed to have finally waived all objection to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition. All hearings of the Commission shall be open to the public.

(3) Upon receipt of such petition, if the issues raised in such petition have theretofore been adequately considered, the Commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issues raised, the Commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the ptitioner and to of such hearing shall be given to the petitioner and to such other persons as the Commission may find directly interested in such decision.

(4) Upon such investigation, if it shall be found that the order complained of is unlawful or unreasonable the Commission shall substitute therefor such other order as shall be lawful and reasonable.

(5) Whenever at the time of final determination upon such hearing it shall be found that further time is reasonably necessary for compliance with the order of the Commission, the Commission shall

grant such time as may be reasonably necessary for such compliance."

"Section 38. Any employer or other person in interest being dissatisfied with any order of the Commission may commence an action in the Supreme Court of Ohio, against the Commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The Commission shall be served with summons as in other civil cases. The answer of the Commission shall be filed within ten days after service of summons upon it and with its answer it shall file a certified transcript of its record in said matter. Upon the filing of said answer said action shall be at issue and shall be advanced and assigned for trial by the court, upon the application of either party, at the earliest possible date."

"Section 41. The pendency of an action to set aside, vacate or amend an order of the Commission shall not of itself stay or suspend the operation of an order of the Commission; but, during the pendency of said action the said Supreme Court in its discretion may stay or suspend, in whole or in part, the operation of the Commission's order. But no order so staying or suspending an order of the Commission shall be made by the said court otherwise than upon three days' notice and after hearing. In case the order is stayed or suspended the order of the court shall not become effective until a suspending bond first shall have been executed, filed with and approved by the Commission, or by the said court or the clerk thereof, payable to the State of Ohio, and sufficient in amount and security to insure prompt payment by the party petitioning to set aside, vacate or amend such order of all damages caused by the delay in the enforcement of the order of the Commission."

"Section 42. All actions and proceedings under this act, and all actions or proceedings to which the Industrial Commission of Ohio or the State of Ohio

> may be parties, and in which any question arises under this act, or under or concerning any order of the Industrial Commission, shall be preferred over all other civil cases, except election causes and causes involving or affecting the public utilities commission of Ohio, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the Industrial Commission in any action or proceeding in which he may be allowed to intervene."

Other sections of the same act are of interest in this connection, but we do not wish to burden this brief with extensive quotations. In passing, we may say that the special jurisdiction of the Supreme Court provided for in the above sections is specifically authorized by Section 2 of Article IV of the Ohio Constitution, but as there is no issue in the case with respect to this point we do not quote the constitutional provision.

Manifestly, if the Industrial Commission's function were to create standards, the judicial review provided for would be inappropriate. Rather, it must be said that it is the Commission's duty to ascertain facts and to apply the law to them; in discharge of which duty it is subject to the reviewing power of the Supreme Court, and all proceedings which the Commission may take with respect to any matter within the field of its activities are, we submit, characterized by due process of law.

The case is not greatly different with respect to the matter of fine coal to which Section 3 of the act relates. The following distinctions, however, may be observed:

In the first place, the Commission is not to act at all except in the event of a failure on the part of the employer and his employes to fix, for stipulated periods,

the allowable percentage of fine coal. But in the event that the Commission does act by reason of the failure of the employer and employes to agree (and only upon the request of one party or the other) the Commission is to make an **ad interim** order fixing such percentage.

The Commission is then vested with authority to make orders with reference to the production of coal with a view to enforcing its standard, and these orders would necessarily operate upon the employes and not upon the employers. A violation of the orders themselves would be punishable under Section 43 of the act of March 18, 1913, which provides as follows:

> "If any employer, employe or other person shall violate any provision of this act or shall do any act prohibited by this act or shall fail or refuse to perform any duty lawfully enjoined within the time prescribed by the Commission, for which no penalty has been specifically provided, or fail, neglect or refuse to obey any lawful order given or made by the Commission, or any judgment or decree made by any court in connection with the provisions of this act, for each such violation, failure or refusal such employer or other person shall be fined not less than fifty dollars nor more than one thousand dollars for the first offense and not less than one hundred nor more than five thousand dollars for each subsequent offense."

The determination of the Commission when called upon to act under Section 3 of the law must necessarily partake of the same character as the determination which it is required to make by Section 2 of the same act; for with respect to both orders the same reviewing power exists; and in the reviewing court the question as to allowable percentage of fine coal must necessarily be considered as a fact. **In the last analysis then the standards are those of the law itself.**

How, then, can the employer complain of a law, which requires of his employes the maximum of efficiency? What more efficacious control for his own benefit over the acts of his own employe could he exercise if the law contained no such provision? In what respect is he injured?

The lower court on this point made the following salient comments found at page 21 of the record.

> "It must be presumed that the Industrial Commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the Commission's order, which by statute is made prima facie reasonable and lawful, he may petition for and obtain a hearing before the Commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the state."

It is ridiculous, then, to characterize these provisions as in any way arbitrary or unreasonable from the standpoint of the employers. The only parties who might complain of them with good grace are the employes, though in point of fact there is no real injury to the employe.

In passing, we feel that we ought to controvert a statement made at the bottom of page 34 of appellant's brief. In dealing with the subject of court review counsel say:

> "The establishment by the Commission of a percentage of impurities so high as to make the coal unmarketable, might shut down the mines during the court review, with losses that would be irreparable."

We call the court's attention to Section 41 of the act of 1913, above quoted, which provides for the issuance of orders of stay and suspension. In considering the question of constitutionality it must, of course, be presumed that the court in a proper case would exercise the powers vested in it by this section.

There is another reason apparent on the face of the act upon which we found our claim that the operators are not injured by those provisions which differentiate it from the Arkansas law. We call attention now to the sanction by which these peculiar features of the Ohio law will be enforced, which is embodied in Section 7 thereof. This is one of the two penal sections of the act. Section 6, which is the other penal provision, prescribes the consequence of passing the contents of a mine car of coal over a screen or other device for the purpose of ascertaining or calculating the amount to be paid to the miner or loader, whereby the total weight of the contents shall be reduced or diminished. The offense thus defined is one which could be committed only by an **employer**. The substantive requirement of the law which is thus enforced, however, if one which this court in McLean v. Arkansas, **supra**, has held to be within the police power of the state; so that in this connection, in which we are discussing only those features of the Ohio law which differ from the Arkansas law, we are not concerned with Section 6.

Coming now to Section 7, we think it may be useful for the purpose of our discussion, to quote it here in full:

> "A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said Industrial Commission, as

hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for the second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

It will be at once observed that this section constitutes the only sanction under the law itself for the enforcement of the substantive provisions of the latter part of Section 1 and those of Section 2 of the act. That is to say the act, having provided in Section 1 thereof, that a miner or loader shall be paid for the total contents of the mine car only upon condition that such contents when removed contain no greater percentage of impurities than that ascertained and determined by the Industrial Commission; and in Section 2 that the Industrial Commission shall ascertain the percentage of such impurities unavoidable in the proper mining or loading of coal in a given mine, Section 7 provides what shall occur in the event that the miner or loader brings to the surface a mine car containing a greater percentage of impurities than that so fixed.

Examining said Section 7 it appears, first, that the penalty which it prescribes is visited upon the employe and not upon the employer. How, then can the employer complain of this feature of the law when its burdens are not cast upon him but upon his employes? As we see it, such complaint could be made only upon one theory,

viz., that by making it an offense for the employe to bring to the surface a mine car containing a greater percentage of impurities than that ascertained by the Industrial Commission as the unavoidable minimum, the law makes all contracts of employment which provide for compensation upon any basis other than the total weight of a mine car containing less than the prescribed percentage of impurities illegal and void. Therefore if a car were brought to the surface containing a greater amount of impurities than that fixed by the Commission the employer would have no choice in the matter but must necessarily reject the whole car and lose as much valuable product as might be contained therein; whereas if the percentage of impurities is within that fixed by the Commission and such standard is not satisfactory to the employer (in spite of his presumably having exhausted his other remedies by applying to the court for a review of the Commission's determination) he must accept and pay for the whole car load without any means of encouraging, by means of the basis of compensation, the production of the extraordinarily pure grade of coal which his market requirements may dictate.

It is upon the assumption that the foregoing is the effect of the law, that counsel for appellant have discussed this entire feature of the case. They simply assume that the act of the Industrial Commission under Section 2 has the effect of depriving the employer of all control over the quality of the product which is to be taken from his mine. We submit that although that which we have described might be the effect of Sections 1, 2, and 7 of the law in the absence of the proviso at the end of Section 7, the presence of that proviso produces an entirely different effect.

Let the proviso be analyzed. It is to the effect that nothing contained in Section 7, which is the penalty clause constituting one of the sanctions for the application and enforcement of a standard of purity fixed by the Industrial Commission under Section 2, shall affect the right of the employer and employe to agree upon deductions by the system known as "docking" on account of impurities. Although the qualifying effect of the proviso is in words limited to "this section" we submit that in reality such effect is exerted with respect to Sections 1 and 2 as well; for, without Section 7, there is nothing in Sections 1 and 2 which would enjoin upon the employer the duty of rejecting the entire car load if he were not disposed so to do, though he might doubtless do so if he wished make such rejection.

Now, the penalty provisions of Section 7 might have the effect, as already stated, of compelling the operator to reject a car load containing a greater proportion of impurities than that fixed by the Commission on the theory that to agree to do so would constitute an illegal contract, but this interpretation of the law is rendered impossible by the proviso with respect to docking. This proviso clearly enables the operator to agree with his employes to accept car loads of coal containing a greater percentage of impurities than that fixed by the Commission, in which event he need not pay for the entire contents of the car, but may dock his employes under such an agreement on account of the presence of impurities in the coal. So far at least it cannot be said that the effect of those provisions of the law authorizing and requiring the Industrial Commission to fix standards of purity is to impose upon the operator a basis

of acceptance or rejection by which he is absolutely bound. He is bound to accept if the standard of purity is complied with, but he is not bound to reject if it is not complied with, though he may do so if he desires.

With respect to the fine coal, it will be observed that the mere **ad interim** order of the Industrial Commission issued under Section 3 of the act is not directly enforceable at all. It is not until after the Industrial Commission has found that the total out-put of a mine for a period of one month during which it has been operating under such a preliminary order shows an excess of fine coal that it is to make and enforce orders relative to the production of coal at that mine. These orders, as has been remarked, would necessarily be directed to the employes. It is true that neither the preliminary order of the Commission nor any of its subsequent orders could authorize the employer to reject a mine car load of coal on the ground that it contained **too much** fine coal, it being the clear intent of Section 1 of the act that all coal shall be paid for as such. We believe that it is not claimed, and we insist that it cannot be claimed, that an operator would have the right to insist that **nothing but lump coal** be mined. Such a condition in an employment contract would be impossible. The most that an operator can do to protect himself from over production of fine coal is to use some means, persuasive in their nature to induce care in mining. He is not precluded by any provision of the act from adopting any such means excepting the rejection of an entire car on the ground that it contains too much fine coal, and this he would never be disposed to do under any circumstances because, as pointed out in numerous places in the report

of the Ohio Coal Mining Commission, the fine coal is itself a marketable product. Therefore the alleged right of rejection on account of an undue proportion of fine coal in the mine car is not a valuable right, and nothing of real interest to the operator is taken from him by the act so long as he is permitted to make contracts which will tend to discourage the production of fine coal. This he may do by stipulating that fine coal shall be paid for at one rate and lump coal at another, a stipulation which the act does not prohibit. Nor does the act make such a stipulation impossible of performance, because while screening the coal for the purpose of compensation in a way so that the **total weight of the contents is reduced or diminished**, is prohibited by Section 6 of the act, there is no prohibition against screening the coal for the purpose of fixing compensation, provided the total weight for which compensation is paid, is not reduced or diminished.

Now, the orders of the Industrial Commission under Section 3 of the law are manifestly for the protection of the employer. It is asserted by appellant that the employers repudiate any such protection and insist that they are not in need of it. The report of the Ohio Coal Mining Commission, however, as we shall hereinafter point out, proves the contrary. At all events, however, Section 3 does not, for the reasons just stated, deprive the operators of any real or substantial rights, and, therefore, cannot be complained of by them as such.

There is still another view which we think might be well presented here, even at the risk of consuming too much space on a purely preliminary point. The argument of appellant's counsel with respect to the effect of

the provisions which we have been discussing, is based entirely upon the assumption that in the absence of legislation, an employer would have a right to reject coal not conforming to the standard of purity dictated by his market requirements as he might interpret that standard. Let us see, then, how the view of appellant's counsel are developed:

It is pointed out on page 15 of appellant's brief, and again at page 28, that the production of some impurities is unavoidable in all mining. Many impurities, such as sulphur, are imbedded in the coal in such a way they cannot be separated from it; other impurities, such as slate, might be separated from the coal, but even in the exercise of extraordinary care, it would be impossible to load the coal entirely free from it. If left to himself, the operator might agree with his employes respecting the production of impurities in two ways; first, each employment contract might stipulate a definite percentage just as the act requires the Commission to determine. Second, the agreement might be that coal containing an unreasonable or undue amount of impurities might be rejected at the option of the employer. We suspect from what counsel say at page 27 of their brief that the typical agreement in the past has been of the second kind. Indeed, appellant's counsel object to the law for the reason, among other things, that it substitutes a definite standard of rejection for a "rule of thumb" method of passing the product. Now, if the employer should agree with his employes upon a definite standard of rejection, that standard could, as the court below well said, not go further than the standard which the law itself adopts, and which it requires the

commission to enforce, viz., the unavoidable percentage of impurities in the proper mining of coal in a given mine. Should the operator not wish to go to this extent in protecting his interests, he is not injured by the commission's determination, and its consequences, for as we have seen in that event he has still the right to agree upon a system of docking. The operator in contemplation of the law cannot possibly protect himself by a definite percentage any more fully than the law itself protects him; hence, the alleged deprivation of rights in so far as it affects his rights to agree with his employers upon a definite standard is illusory.

But if the employer prefers the "rule of thumb" the question at once arises as to whether he has a natural right to enforce such a rule. Our contention here is that he has no such right, so that the law by putting an end to such a practice does not deprive him of anything. Suppose the agreement were that the employer might reject coal that was impure without stipulating the standard of purity by way of definite percentage. Can it be for a moment contended that the operator under such an agreement can arbitrarily reject mine car loads of coal and thus deprive his employes of compensation **pro tanto** for work which they have performed?

We think it is elementary that if the operator rejects by a "rule of thumb" he does so subject to the right of the employe to sue to recover his wages for mining or loading such rejected coal, in which suit the issue would be as to whether or not the car load brought to the surface by the miner contained an undue amount of impurities. In other words, the employer's rejection would not be final. He would have the right to reject only to the

extent that the basis of his rejection was correct in fact. He cannot exercise any arbitrary privilege in the premises at all. So that if the operators base their plea for protection under the Fourteenth Amendment of the Federal Constitution upon the deprivation of a supposed right to reject **arbitrarily**, it at once appears that the thing of which they have been deprived is not a right which exists and is protected by the amendment.

But assuming the existence of a "rule of thumb" and assuming, too, that the application of that rule might be challenged in an individual case in a suit to recover wages based upon alleged improper rejection, what would be the standard which the court would instruct the jury in such a case to apply? Obviously the instruction of the court in the absence of any statute would be that the operator would have the right to reject a car load of coal containing a percentage of impurity in excess of that which would be produced by the exercise of proper care and in the proper mining of the product; but that if the percentage of impurities which was found in the car load was no greater than would be unavoidable in the proper mining of coal in the mine in question, the operator could not reject the car load and deprive his employes of compensation thereby.

In short, in an action for wages between an employe and his employer in which the right of reduction on the part of the employer under an employment contract of the second class above referred to would be brought into question, **the law applied by the court and jury would be exactly the same law as that embodied in Sections 1 and 2 of the Ohio act now under review.**

Therefore, it follows with certainty that these provisions of the Ohio law do not deprive the operators of any rights which they have or enjoy under the federal constitution. If any rights are taken away it is those of the operatives, designated in the act as miners or loaders, for the act is at least susceptible to the interpretation that the standard of efficiency exacted of them by the sections now under consideration is such as to require extraordinary care.

For all the foregoing reasons, then, we submit that the operators as a class are not deprived of any real or substantial rights by those provisions of the act of Ohio which differ from and are additional to the provisions of the Arkansas law so that the question as to whether the alleged deprivation of rights is justified under the police power is not even properly raised in this case.

4. The Provisions Particularly Complained of are Appropriate and Necessary Incidents to the Main Object of the Law.

We have just finished the discussion of three reasons which we think lie in the way of any effort on the part of the Rail and River Coal Company to invoke the protection of the Fourteenth Amendment of the federal constitution; those reasons being, first, that it is a corporation, and as such not entitled to claim that its liberties are invaded; second, that the act does not in any way deprive it of property; and third, that those provisions of the Ohio law in respect of which it differs from the Arkansas law, do not in any real or substantial way deleteriously affect the interests of the coal operators as a class,

whether those interests be regarded as pertaining to the right of liberty or the right of property.

These points have been mentioned because they are in the case; but it is by no means necessary to rely upon them in order to dispose of the general issue. These provisions of the Ohio law are so plainly and palpably incidental and appropriate to the accomplishment of the main purpose of the law, which is the same as that of the Arkansas legislation, that the case may be rested upon this consideration alone.

We recall to the court's attention that in the McLean case it was held that a state in the exercise of its police power might require that coal miners working under a wage scale based upon weight should be paid for all coal mined by them, and that their employers might be prohibited from using a screen or other device for the purpose of subtracting from the gross weight of the product mined by their employes for the purpose of ascertaining the compensation of the latter. We mention again also that the fact that the Ohio law aims to accomplish these same results; so that, if it went no further, its constitutionality under the Fourteenth Amendment to the Federal Constitution could scarcely be questioned seriously. So that we are dealing, so far as the Fourteenth Amendment and claims of right put forward under it are concerned, solely with those provisions of the Ohio law in respect of which it differs from the Arkansas.

We repeat here, too, that appellant, in assailing the Ohio law on account of the presence of these additional provisions, has assumed the burden of showing that they have no necessary or appropriate relation to any public purpose, or that considered as a means to some proper

end, they are arbitrary, unreasonable or beyond the needs of the case.

In order to sustain the burden thus cast upon their clients, counsel for appellants in their brief, beginning at page 15, first discuss the effect of Sections 2 and 3 and related provisions of the Ohio law upon the alleged rights of the operators. Previously in this brief we have shown, we think, that no real or substantial rights of the operator are in any wise deleteriously affected by these provisions. But this, of course, is not the question now under discussion. It would be only natural, as we have pointed out, to find that a police regulation, justifiable only as such, does in a conventional sense restrain and compel the conduct of individuals in ways to which such conduct would not be limited by the common law; therefore the mere fact that restraints and compulsions are found in a law of this type, does not put an end to the inquiry, but merely raises the question as to the relation of such restraints and compulsions to the public end to be served.

The cases cited and quoted from by counsel at pages 19 to 22, inclusive of their brief, merely state the rule which must be applied here as we ourselves have stated it. Searching through the brief of counsel for a reason supporting their claim that the provisions of the Ohio law, different from those of the Arkansas law, "are arbitrary, unreasonable and unnecessary" we find the first suggestion of such a reason at the bottom of page 25 of the brief. Beginning at that point and extending to the middle of page 28 will be found an argument, the effort of which is to show **a priori** that these features of the Ohio law, the nature of which has been sufficiently dis-

closed heretofore in this brief, are impracticable; that the Industrial Commission cannot in the nature of things fix a standard of purity or of fineness that will be of any service, and that even if such a standard could be fixed, it would be impossible to apply it in the way in which the law intends it should be applied.

We feel that we need not answer any such argument as this, in view of the well established principle that laws will not be declared unconstitutional upon mere speculation. It is true that the bill avers, as counsel state, that "the proposed plan of control and supervision by the Industrial Commission is arbitrary, unreasonable and wholly impracticable in the daily business operations of mines," and that "it must be assumed here that upon the hearing on the merits, evidence" (consisting, no doubt, of opinions) "will be offered to sustain these averments." But we point out that the bill shows on its face that it was filed not only before any opportunity for gaining experience under the actual operation of the law had been afforded, but even before the law went into effect. (See paragraph 8 of the bill, page 4 of the record.) We understand that this court has in numerous cases declined to consider averments of this sort as bearing upon the constitutionality of a law. Actual experience is required in order to stamp a law as ineffective, impracticable or unreasonable.

Red "C" Oil Co. v. Board Agriculture, 222 U. S., 380.

Patapsco Guano Co. v. N. C. Board of Agriculture, 171 U. S., 345.

Knoxville v. Knoxville Water Co., 212 U. S., 1.

Willcox v. Consolidated Gas Co., supra.

212 U.S, 19.

None of the cases cited involve a question precisely like the one here made, but we submit that the principle which runs through them is properly applicable here. Apprehensions will not suffice to strike down the legislation of sovereign states; actualities are required. But the files of this court will show the inappropriateness of the claim made by counsel for appellants. The report of the Ohio Coal Mining Commission shows that the investigations and conclusions therein abstracted were the work of a body of men selected for the task because of their peculiar qualifications. The resolution creating the commission provides expressly that one of the members of the commission shall be "a representative of the producers of coal," and that one shall be "a representative miner," the remaining members of the commission were to have "no direct or indirect pecuniary interest in the mining, production or transportation of coal in this or any other state or country." (103 O. L., 981.)

As a matter of fact the commission consisted, in addition to the members required by the resolution, of a judge of one of the appellate courts of the state, a professor of economics in the State University and an inspector of mines. Three of the members of the commission were formerly practical miners. Indeed, one of them was a miner in active service at the time of his appointment. The gentleman who represented the operators possessed an experience perhaps excelled by no other available person. (See affidavit of John M. Roan in opposition to the application for a temporary restraining order, on file with the clerk.)

We feel that we may step outside of the record for the purpose of acquainting the court with these facts, which

are of common knowledge in Ohio, as is the further fact that it was well known that the measure which the court has under consideration in this case was to be the primary subject of the investigation of the commission. In fact, even a cursory examination of the joint resolution above cited will show this to be the case.

Now, appellant's counsel criticize the commission's report because it does not demonstrate just how the plan of having the Industrial Commission determine the percentages to which the act refers will operate in practice. (See page 27 of the brief.) We say the fact that the Ohio Coal Mining Commission was as representative as it was, taken in connection with the fact that after a most careful and thorough investigation of the entire subject, its members unanimously recommended the measure which the court is asked to strike down, sufficiently establish the inference, which is the only inference which at this time may be entertained by the court, that the requirements of the act are practicable and will operate reasonably.

But it is not necessary for us to establish that the act will operate in practice; the burden is, as we have stated, upon appellant to establish that it will not operate in practice. This appelant's counsel has sought to accomplish by naked assertion.

The next positive objection to these peculiar features of the Ohio law which we find mentioned in appellant's brief is suggested at page 29 thereof. It finds expression in the argument that because the commission is to make a separate determination as to each mine and because market conditions do not vary in relation to physical conditions in the several mines of the state, therefore

market conditions are not intended to be taken into consideration in applying the statutory rule as to proper mining and unavoidable impurities. Then the claim is made that a standard of purity which does not take market requirements into consideration is arbitrary and unreasonable.

It will be observed, first, that this argument depends upon the premise that the act excludes from consideration the market conditions. It is a well known fact, of which the court may take judicial notice (and if judicial notice needs assistance, reference to part one of the report of the Ohio Coal Mining Commission, and particularly 1 to 13 thereof, will suffice for this purpose) that coal is deposited in the earth in seams corresponding to geological strata. The commission finds that several distinct seams occur in Ohio, and that the coal from such seams as are workable finds its way in the ordinary channels of trade to well defined markets. For example, seam No. 2 is spoken of at page 9 of the Commission's report in the following language:

> "The coal is chiefly consumed within the state or is purchased by the railroads for use in locomotives. Owing to its softness it is not suitable for the lake trade."

We call the court's attention, without quoting, to the remarks of the commission with respect to seam No. 8, known as the "Pittsburg Seam" (pages 11 and 12 of the Report), which we believe is the seam in which the mining operations of the appellant are carried on (although this does not affirmatively appear in the record).

It is true, then, that the market for coal from a given seam is a rather well defined thing and the methods of

mining have a clear and recognizable relation to the condition of the seam and to the market. Therefore, upon these facts we submit that it is at least partly true that the proper mining of coal in a given mine has a direct relation to the conditions of the market into which coal from that mine will go.

Moreover, we think that in the ascertainment of a standard of "proper mining" market conditions would be a natural factor, and that the act implies as much on its face.

Of course, if the law **permits** market conditions to enter into the determination of what constitutes proper mining and an unavoidable percentage of impurities, etc., as well as an allowable percentage of fine coal, it follows that the law also **requires** this feature to be taken into consideration. And if the law **requires** such a determination then the presumption is that the same **will be made.** Nor is the law without ample safeguards against improper action on the part of the Industrial Commission, as we have already pointed out.

Another specific objection to the peculiar features of the Ohio law is stated, but not developed, at the bottom of page 30 of the brief. It is that the introduction of a percentage system will "cause nothing but discord and trouble."

We suppose that it is hardly incumbent upon us to discuss this claim seriously because there is no argument in appellant's brief in support of it. We may suggest to the court, however, that there would seem to be less likelihood of discord and trouble arising under a definite standard than would arise under the "rule of thumb" of which counsel speak on another page of their

brief. Indeed, if **a priori** reasoning is permissible at all (and we are in the position of objecting to it for the purposes of this case) we should like to suggest some reasons of this character, tending to show that the fixing of a standard is rather a means of **avoiding** discord and trouble than a likely cause of disturbances.

Another, and perhaps the last ground of objection to those features of the Ohio law, in respect of which it differs from the Arkansas law, is suggested at the bottom of page 31 of the brief. It is stated that the regulatory features which peculiarly characterize the act under consideration are alleged to be necessary to protect the operator against certain evils upon the supposed theory that he will be unable to protect himself from their occurrence under a mine-run system of compensation. The following argumentative question is then asked:

"Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts?"

It is pointed out that legislation affecting the compensation of employes and otherwise regulating the terms of employment contracts, is justified on the ground that it protects the employe as the "dependent party." Therefore it is inferred, though not stated, that the employer must be under all circumstances in a position of natural advantage so that legislation for his benefit cannot be sustained under the police power.

This line of thought sounds well as an abstraction, but when the facts surrounding the enactment of this law and the experience of other states under mine-run laws are examined and the true situation appears, the neces-

sity for such regulation becomes at once apparent. Inasmuch, however, as discussion of this point is positive rather than negative, we postpone it to a more appropriate place in this brief.

Lastly, and perhaps in the same connection, it is complained in very strong language on page 32 of the brief that the provisions under discussion subject the operator to drastic burdens. We are unable to see that any real burdens are imposed upon the operator by **these features of the act** at all, and this point has been developed previously in this brief. The language of appellant's counsel throughout the brief in criticizing these provisions of the Ohio law, may be, we think, fairly described as intemperate. A reiteration of adjectives such as "arbitrary," "unreasonable," "impracticable," "useless," "unnecessary," and the like is manifestly out of place, if we may say so with deference, for the reason that the exact issue of law is as to whether, in the legal sense, these requirements of the Ohio law are, reasonable, necessary, appropriate, etc.; so that to argue to the desired conclusion by merely characterizing the provisions in question in the manner in which they are referred to in the brief, begs the main question.

We come now to the positive argument in support of the proposition for which we are contending, having dealt with the objections made by appellant as they appear in the brief. That contention is that the provisions which the law makes for fixing standards of purity and fineness are appropriately incidental to the accomplishment of the main purpose of the act. That the main purpose of the act is within the police power of the state, so that any means chosen to effect that purpose and ap-

propriate thereto, are devoted to a public end, is a question which, so far as the Fourteenth Amendment to the constitution is concerned, is, it seems to us, not open to doubt.

McLean v. Arkansas, **supra.**

The facts which show the relation of the provisions which are discussed in the briefs to the main purpose of the act are fully set forth in the report of the Ohio Coal Mining Commission, to which reference is generally made. They are facts of which the court may take judicial notice.

Muller v. Oregon, 208 U. S., 412.

The experience of states like Arkansas, operating under what might be characterized as a straight mine-run basis of compensation, shows that when the law or the employment contract requires compensation on the basis of the entire weight of the coal produced, coupled with a right of rejection on the part of the employer, the very marked tendency on the part of the miners is to load into the cars everything which can be taken out of the mine, including not only marketable coal but also impurities, dust and slack. The operator's right to reject or to dock is of no avail to him, because it can be made effective only at the risk of losing what is valuable in the product mined. That is to say, if the operator finds his mine cars filled with dirt and impurities and his coal shot into powder, he must, as the Arkansas law had it, "either accept or reject." If he accepts then he is put to the expense of cleaning his coal before it can be marketed; if he rejects, the whole car load goes to the dump

and is a total loss. Of the two evils the operators chose that which was obviously the lesser and accepted the coal. The consequence of this was a tremendous waste, first in the deterioration of the quality of the coal entering the markets from the mines of the state, and, second, in the otherwise wholly unnecessary expense involved in cleaning the coal.

To show what the actual tendencies with respect to impurities are we may quote from the report of the Ohio Coal Mining Commission, which abstracts the testimony of a former president of the Illinois Coal Operators' Association, the value of whose opinion seems to have been regarded by all parties as very great. The following quotation from his testimony is found at page 56 of the report:

> "In the most mines where the men get paid for mine-run coal, they get everything out they can load on a shovel, where they didn't continue to do that when the product went through the screen; that is, if a man was cleaning up his place, he cleaned it up just as clean as this floor because he gets paid for it if it is being weighed and paid for mine-run."

And again at page 58 of the report this witness is quoted as saying:

> "A. Yes, whether the coal is cut low or high, why, the men will load everything that is loose in that room, where under the lump-coal system, they formerly left that in because it didn't do them any good.
>
> "Q. How did you dock them? A. You can't dock them, you can't catch them.
>
> "Q. There is no way of catching a man on the run-of-mine system? A. Under that system you can't catch that class."

There is other testimony to the same effect in the report. The conclusions of the commission are stated at page 58 of the report in the following language:

> "Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface, unless some way were found to protect the operator from the carelessness or indifference of the miner."

It will be observed that the commission reached this conclusion after a very careful investigation and upon testimony produced before it by the operators themselves. There can be no doubt whatever as to the correctness thereof.

Now, no operator will be heard to say that he desires an increase of impurities. If, under a straight mine-run system like that which obtains in Arkansas, there has been a marked increase of impurities of the kind referred to in the commission's report, it must have occurred in spite of all the operators could do to prevent it; therefore the conclusion irresistibly follows, that if left to themselves on this point, and given unrestricted "freedom of contract" for their own protection, the operators would not protect their product but their business would appreciably suffer. There is only one alternative to the result which has actually occurred in Arkansas, Illinois, Indiana and other states having the mine-run system. Should the operators assert themselves and endeavor, by docking, rejection or otherwise, to protect their product from deterioration by the loading of impurities, they would have only the "rule of thumb" of which appellant's counsel speak, by which to enforce their supposed rights. If we are to speculate,

may we not fairly assume that any effort on the part of the operators, under a straight mine-run system, to protect themselves against over-production of impurities by rejection or by docking, both according to the "rule of thumb," would result in disputes and heated controversies with their employes? It seems very natural to us that this should be so.

With respect to fine coal, the situation is somewhat different. The testimony of the same witness is quoted at page 48 of the commission's report as showing that the mine-run system does not produce a marked over-production of fine coal, save in mines in which the coal is cut by hand or the use of the pick. In machine-cut mines there is no temptation to "shoot from the solid" and thus to use so great a charge of powder as to shatter the coal. Nevertheless, the operators who appeared before the commission expressed the gravest apprehension lest the elimination of the screen as an instrument or device for use in fixing the basis of compensation, might result in an over-production of fine coal; so that the commission in order to guard against an evil which might possibly exist saw fit to recommend the insertion in the law of those provisions which relate to this subject.

Whatever may be the evils of the straight mine-run system from the standpoint of the operator, he is helpless to prevent them and can do nothing but to install washing machinery at large expense. His helplessness is not due to his being naturally the dependent party to the employment contract; it is a condition forced upon him by a law of the state compelling him to pay his miners on the basis of the entire weight of every accepted mine car.

So, then, it is the **law**, that is, a straight mine-run law like that of Arkansas, which has placed the operators subject to such a law, in a position of disadvantage. If, then, it is within the legislative power to create such a disadvantage, does not the same legislative power extend to the removal of such disadvantage?

In the light of the actual experience under the Arkansas law and wage schemes similar in effect, does not the alleged desire of the appellant to be allowed to exercise its liberty of contract in fixing standards of purity and the like appear in a questionable light? All the elaborate and plausible argument which may be found in appellant's brief relative to what might or would happen under certain circumstances loses its force when what has actually happened under those circumstances is made to appear. We cannot believe that those represented by appellant sincerely object to the peculiar features of the Ohio law; their vehemence on this point suggests to us that the real object of their attack is the mine-run system itself, which the McLean case protects from direct assault.

The direct and positive relation of the provisions with respect to standards of purity and fineness to the main object of the law, is therefore, found in the fact that, without these provisions, the practical operation of similar legislation has resulted in evils which partake of a public nature and are themselves proper subjects of regulatory legislation. That the safeguards against the evils which would otherwise attend upon the operation of the law must of necessity be efficacious is, we think, not open to argument notwithstanding the contradictory statement of appellant's counsel. It is said that it

would be impracticable to determine whether or not the contents of a mine car contain, for example, more than a prescribed percentage of impurities. This statement of counsel is based upon a probable misunderstanding of what the law requires. They have evidently confused its provisions with those of the Arkansas law, which requires the coal to be accepted or rejected before it is weighed and screened. Of course, if the quality of the coal is to be determined by inspection of the mine car, there will never be any way to test the quality by definite standards. But the Ohio law contains no such provision. Its prohibition against the use of the screen is directed against employing it for the purpose of subtracting from the total weight of the contents of the car. There is no prohibition against screening the coal before it is weighed or before it is accepted or rejected or the basis of docking fixed. If there were installed what are called in the affidavit of Mr. John M. Roan on file with the clerk "hopper scales" it would be very easy to determine the exact proportion of impurities and the exact proportion of fine coal in the contents of any mine car. Therefore, the difficulties which have been encountered by the operators under the Arkansas and Illinois laws would be entirely obviated and it would be possible to detect with precision any and all improper or careless mining and to fix the compensation of the guilty miner accordingly.

We see, therefore, that the "rule of thumb" of which counsel speak can be done away with and that its elimination would make effectual all the provisions of the Ohio law which are designed to safeguard against the occurrence of those evils which experience has shown necessarily follow from the operation of a straight mine-run law.

That these are real public evils of such a nature as to justify the exercise of the police power for their obviation is demonstrable by the use of authorities which are cited against us on the general issue of the case. One such decision will suffice. We refer to the case of In Re Preston, 63 O. S., 428. In that case an Ohio statute almost exactly like the Arkansas law upheld by this court in the McLean case, was declared unconstitutional by the Supreme Court of Ohio. In the course of the opinion, per Shauck, J., appears the following language, which constitutes the sole reason given by him for the decision at which the court arrived:

> "By the method of payment heretofore used, in which compensation was determined upon the basis of screened coal, miners had become entitled to receive, and operators had become bound to make compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to the miners without discrimination on account of their skill and care. * * * Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it established a uniform standard of earning capacity. A standard thus to be established for all must necessarily be that of the **least efficient**, since their efficiency cannot be increased by legislation * * *."

Stated succinctly, the provisions of law involved in this decision (and it will be found repeated in the syllabus, which under the rules of the Ohio court embodies the decided law of the case) is that a law, the natural result of which is to discourage efficiency and reward inefficiency cannot be justified under the police power,

though it may tend in other ways to beneficial results. That is to say, the Ohio court held the former screen law unconstitutional because it resulted, or would result, in a public evil; for nothing but a public evil would justify a court in taking the attitude which the Ohio court took. Now, if the evil of which Judge Shauck speaks in his opinion In Re Preston, was sufficient upon which to found the operation of a constitutional limitation against a law passed by the legislative department, is not the obviation of that evil as an incident to similar legislation, an end within the legislative power? And if this is so, does it not follow that provisions like those about which specific complaint is made in this case are necessary and appropriate incidents to the accomplishment of the main object of the law?

These argumentative questions suggest to us their own answers, and we submit that the very constitutional demerits seen by some of the courts in laws like that of Arkansas, constitute, in any view of the case, public evils grave enough to justify the imposition of safeguards through effective provisions like those peculiar to the Ohio law.

Again, the operators spurn protection against fraud on the part of their employes, saying that they have never been considered to be the weaker party, and inquiring upon what theory protective legislation can be justified for the benefit of the stronger party. Curiously enough it is alleged in the bill, though not developed in the brief of appellant, that the effect of the Ohio law is to deprive appellant of the equal protection of the laws of the state. We have shown that in practice, laws like the Arkansas law, tend, in a sense at least, to protect the employes to

the detriment of the employers. Though we should not at this stage and in view of the decision in McLean v. Arkansas, urge that such law as that of Arkansas results in unequal protection, yet it is clear that the purpose of the Ohio law is to afford as much protection to the employer as the other provisions of the law give to the employes. For, under the Arkansas law as it practically operates, and upon the facts disclosed in the inquiry conducted by the Ohio Coal Mining Commission, it appears that the employers have been unable to protect themselves against the production of an undue proportion of impurities on the part of their employes. The conduct of the employes has proved to be such as might almost justify the appellation of fraud. The Ohio law protects the employers against such frauds and, therefore, the protection accorded to the employers is equal to that accorded by the remainder of the law to the employes. May we not then suggest that the additional provisions of the Ohio law are conceived in the spirit of affording equal protection of the laws to both parties to the employment contract?

In another view of the case, the public is entitled to protection against an inferior and adulterated product.

Freund on Police Power, Section 32.
~~Schreindinger~~ Schmidinger v. Chicago, 226 U. S., 587.

If a **state law**, such as the Arkansas law, results practically in the production of an adulterated commodity, does not the state owe to the public the obligation of removing the evils thus attendant upon such legislation? To be sure, the laws of competition are sufficient to remove the evils; but the **burden** of removing

them is cast upon the **employers** who must install expensive washing machinery and other like devices in order to alleviate a condition which is the direct result of legislation of the state. Sound public policy dictates that the state shall by legislation alleviate evils which it has created by legislation, rather than that the burden of alleviating such evils so created shall be cast upon private individuals. So, we think that it is clear that there is a direct and obvious connection between the public purpose to be served by the main provision of the Ohio law and the peculiar features of that law which have been discussed in this brief. These features, we submit, constitute necessary and appropriate means for the accomplishment of the ultimate purpose to be served by the whole law and are therefore clearly within the police power of the state.

The complaint is made in the brief of appellant as well as in the bill that the fixing by the state of standards of purity and fineness for the purpose of safe-guarding against the evils otherwise attendant upon the enforced adoption of the mine-run system of compensation, constitutes an interference with a private business. Of course this is true in the academic sense. The mere fixing of the mine-run system itself, by a law similar to that under review in McLean v. Arkansas, involves an interference with the conduct of private business. Such additional interference as the Ohio law embodies, presents a difference of degree and not of kind. But this court has frequently decided that the mere fact that an incidental regulation involves an interference with a private business does not impair the validity of such a regulation if the same be merely appropriate to the

accomplishment of some main purpose which is within the legislative poewr.

Interstate Commerce Com. v. Goodrich Transportation Co., 224 U. S., 192.
Flint v. Stone-Tracy Co., 220 U. S., 107.

Before leaving this point, we call to the court's attention that means other than those found in the present act have been selected by the Ohio legislature for the prevention of the evils attendent upon an over-production of slack or fine coal. Such evils are not limited to the effect of such a practice upon the quality and value of the product. There is an element of public safety which is also involved, in that what is known as "shooting from the solid" is a highly dangerous proceeding. In addition, therefore to the powers of the Industrial Commission under Section 3 of the Ohio law the legislature has created other restraints tending to avoid such abuses. They are embodied in an act passed at the same session of the General Assembly of Ohio, and found in 104 O. L., 161. We need not quote this act here as it is not directly involved, but may describe it by saying that it prohibits "shooting from the solid", except upon permission of the Industrial Commission.

We think that the previous discussion has established five conclusions which we may state as follows:

1. There is a direct and obvious connection between Sections 2 and 3 and other similar provisions of the Ohio law and the subject matter affected by the remaining provisions of the act.

2. These peculiar features of the Ohio law are aimed at the correction of conditions that constitute public evils.

3. Such conditions are those which are produced by the practical operation of a mine-run law without such provisions as are peculiar to the Ohio legislation.

4. The peculiar features of the Ohio law are effective to obviate the evils at which they are aimed; or at least in advance of experience under the law, they will be presumed for the purpose of this case to be efficacious.

5. Therefore the mere fact that these peculiar provisions in the academic sense involve a further restraint upon the liberty and contract and (possibly) a further deprivation of the property of the operators, and that they constitute an interference with the conduct of a private business, do not make them invalid as an exercise of the state police power; for, where a given measure is promotive of the public good by being intended to obviate an established evil, and where it is a means chosen for the accomplishment of an end admittedly within the police power of the state it may, and as a matter of course, must interfere with private interests, and such interference will not make such legislation void.

There remains but one final word on this branch of the case, and that is that there is nothing in the case to justify the belief that the means taken by the Ohio legislature to safe-guard against evils which otherwise follow from the operation of a mine-run law, are more drastic than the interests of the case require. That such is the case has been argued by appellant's counsel; but they offer nothing as a substitute safe-guard against the evils in question excepting the ability of the operator to protect himself and the public by the exercise of his rightful control over his own business and employes.

That this control will not suffice to obviate the evils is established beyond peradventure by the testimony taken before the Commission, which testimony was that of the representatives of the operators themselves.

We, therefore, submit that the differences which exist between the Ohio law and the Arkansas law, so far from being such as would make the former unconstitutional, are in point of fact such as to remove objections which might be (and have been) made to the constitutionality of a law like the Arkansas law; and that upon no hypothesis whatever can the Ohio law be held unconstitutional on account of these peculiar provisions, so long as the constitutionality of the Arkansas law is sustained. Therefore, in so far as the Fourteenth Amendment of the Federal Constitution is concerned the appellant has not made out a case for its protection.

The Business of Mining Coal Has Become Charged With a Public Interest.

The court below intimated that the Ohio act under review here might be sustained upon the independent ground suggested by the citation of the case of German Alliance Insurance Co. v. Lewis, 233 U. S., 389.

There was plenty of testimony before the Ohio Coal Mining Commission, as will be disclosed by its report, that under the screen coal system of compensation the tendency on the part of the employes is not to clean out of the coal rooms coal that would pass through the screen and, therefore, would not enter into their compensation, although such coal was a marketable product, and if left in the mine would be forever lost. The Commission's report shows also that some coal mines in Ohio have been exhausted. The Coal Mining Commission deals with this subject at pages 13 et seq., of the report.

We do not think the question suggested is an important one in this case because it is a consideration affecting the entire act rather than merely those portions of the act which are peculiar to it as a mine-run law in distinction from the laws of the type involved in McLean v. Arkansas. Other grounds being sufficient to sustain the act in the main and in detail, at least against objections to it raised under the federal constitution, it is scarcely necessary for us to rely upon this point very strongly. However, we believe that the lower court was right and that the business of mining coal, by reason of the character of the operation, has become charged with a public interest; though we admit that old decisions can be found to the contrary.

Let the case of Millett v. People, 117 Illinois, 294, cited by counsel for appellant at page 18 of their brief, be examined. We do not criticize this decision as being incorrect on the merits of the case then before the court, because at the time it was rendered it stated what was undoubtedly the law, in the main. However, the reasoning involved in the case is false in several particulars. In the first place the statement is made that mining for coal was not by the common law affected by a public use. This is true; but neither was the business of insurance affected by a public use by the common law; and this is the very ground-work of the opinion in German Alliance Insurance Co. v. Lewis, supra, as we understand that case. The common law is not fixed and unchangeable set of rules; it is an organically growing body of principles. The principles, it is true, remain the same, but the application of the principles varies as social conditions change. Therefore the mere fact one cannot find

any decision or precedent for holding that the business of mining coal is charged with a public interest does not suffice to prove that it has not become so charged. Again in Millett v. People, supra, the court says:

> "The owner of a coal mine is under no obligation to obtain a license from any public authority and therefore when he chooses to mine his coal he exercises no franchise."

This is an egregious instance of false logic. It is a palpable begging of the question. In Wyman on Public Service Corporations, Sections 50 and 90, will be found a full statement of the true principles underlying the charging of a business with public use. It is not a test to determine whether a business is charged with a public use or not that a license or franchise may be required for its transaction; rather it is the opposite which is true, viz., that the power to make the transaction of a business a franchise rests upon whether or not it is charged with a public interest.

Another statement made in Millett v. People, supra, is that:

> "The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wheat or turf or even to the owners of grain, domestic animals or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country."

This statement is palpably untrue. It is true that coal as a commodity is a necessity, and has this one thing in common with the other commodities mentioned by the court. But to say that the public are not compelled to resort to mine owners any more than they are

compelled to resort to the owners of grain carries its falsity on its face. For the owner of grain can plant and reap in a single year. Out of a single field he can produce an indefinite number of crops. Not so with the owner of a mine. When he has abstracted from the geological strata which he owns all of the coal which he cares to take out and has permitted the roof of the mine to cave in, thus making it practically impossible for another person to get what remains, no more coal will ever come out of that mine.

Now, it is pointed out in Wyman on Public Service Corporations (and this author does not class coal mines as public utilities) that the element of natural monopoly is at the foundation of the doctrine of public interest in a business. Limitations upon sources of supply, difficulty of distribution and the like are the things which charge a business with a public interest. As long as there was plenty of coal the limitations on the supply, though theoretically existing, were of no practical importance; but just as soon as conditions got to the pass described by the Ohio Coal Mining Commission on the pages of its report above cited, a change takes place. The supply of coal becomes limited and the public interest requires that it be preserved in as economical manner as possible. In short, when the supply of coal has diminished to a certain point, whatever that point may be, the public interest in conserving that supply and husbanding it as a natural resource becomes paramount to the private interest of the owner and operator of the mine.

We need not discuss this point further in this connection, although we shall have occasion to refer to it when

discussing the application of a recent amendment to the Constitution of Ohio.

Appellant's counsel are disposed to admit that if it can be established that the business of coal mining is charged with a public interest there is an end to the case. In this we agree with them; and submit that the business of mining coal has, in Ohio, become charged with such public interest by limitation of the source of supply ofthe commodity; and that for this reason alone the decision of the lower court should be affirmed.

Penalties.

Appellant complains that the penalties fixed by Section 6 of the act are so excessive as to preclude recourse to the federal courts for the purpose of testing the law, and that they are therefore unconstitutional under the rule laid down in Ex Parte Young, 209 U. S., 123.

We submit that in order to sustain this claim the following elements must be established:

1. The validity of the statute for violation of which penalties are imposed must not have been finally determined.

2. The action in which this kind of an attack is available must be one in which the penalties are sought to be enforced or in which their enforcement is sought to be prevented.

3. The penalty provisions must be so bound up with the remainder of the act that they cannot be separated from it.

4. The penalties themselves must be so enormous and unreasonable as that the inference must arise that they

were designed to precent recourse to the courts except at peril of deprivation of property or liberty.

ExParte Young, Supra.
United States v. Delaware & Hudson R. R. Co., 213 U. S., 366, 417.
Western Union Telegraph Co. v. Richmond, 224 U. S., 160, 172.

The penalty provided by Section 6 of the Ohio act does not satisfy these tests. In the first place this penalty (which is the only one provided by the act of which appellant can complain) is prescribed for the offense of passing coal over a screen or other device for the purpose of ascertaining the amount to be paid for mining or loading such coal whereby the total weight thereof shall be reduced or diminished. That is to say, this penalty constitutes the sanction of that portion of the law which is like the Arkansas law. The other portions of the Ohio law which have been made the subject of complaint under the Fourteenth Amendment are enforced by the sanction of penalties **to be imposed upon the employes.**

It is our contention that there has been a final determination in the McLean case of the validity of that part of the statute for violation of which the penalities are imposed; so that we have here a case described in the opinion in Ex Parte Young, at page 146 as "one very different from that here presented".

In the second place the nature of this proceeding is such as that the question is not properly raised in this case. There is no actual or immediately threatened effort on the part of the state to enforce this penalty against appellant.

In the third place the penalty provided for in Section 6 is clearly separable from that part of the act the constitutionality of which has not been finally determined. It is true that the penalty cannot be separted from Section 1 of the act, but as we have hereinbefore pointed out, the remaining sections of the act, concerning which the complaint under the Fourteenth Amendment is particularly made, in this case, are to be enforced by independent sanctions clearly separate and distinct from the penalty prescribed by Section 6.

In the fourth place the penalty is not itself excessive. This was determined by the court below; but in this connection we may step aside to remark that a minimum penalty of $300 for each separate offense is not made excessive solely by reason of the fact that one day's violation of the law by appellant would subject it to penalties aggregating $800,000. If the fine were $50 instead of $300 the aggregate would still be in excess of $130,000 for a single day's violation on the part of the appellant. That is to say, the fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum

For the foregoing reasons and upon the foregoing authorities as well as in view of more recent decisions of this court such as Wilcox v. Consolidated Gas Co., 212 U. S., 19; Grand Trunk Railway Co. v. Michigan Railroad Commission, 231 U. S., 457, and the Ohio Tax Cases, 232 U. S., 576, we submit that the whole act should not be held invalid on account of the penalty prescribed by Section 6 thereof.

THE OHIO CONSTITUTION.

1. Alleged Delegation of Legislative Power.

Appellant in its bill complains of the Ohio act that it violates the constitution of Ohio in several respects. One of these complaints is the familiar one respecting alleged delegation of legislative power. It is scarcely necessary for us to notice this contention in view of the explicit rule of action laid down by the law itself for the guidance of the Industrial Commission, and in view of the multitude of authorities available on the question, some of which are cited by Mr. Justice Pitney in his opinion in Plymouth Coal Co. v. Pennsylvania, supra.

In fact, we submit that the very fact that the orders of the Industrial Commission of Ohio are subject to review by the Supreme Court of the state itself disposes of the thought that the power which is committed to the commission is legislative. If the Commission can make law then the court would be bound by its orders.

So far as the interpretation of the Ohio Constitution in this particular by Ohio courts is concerned, we refer the court to the cases of:

Board of Health v. Greenville, 86 O. S., 22.
Fairview v. Giffee, 73 O. S., 183, 189, 190.
Rose v. Baxter, 7 Ohio N. P. n. s., 132 (affirmed without report, 81 O. S., 522).
Theobald v. State, 30 C. C., 336.
Railroad Co. v. Commissioners, 1 Ohio State, 77.

2. Decision of the Ohio Supreme Court in the Case of In Re Preston, 63 O. S., 428.

We have shown in this brief that the safe-guards which constitute the peculiar provisions of the present Ohio law are sufficient to distinguish it from the law held unconstitutional by the Ohio Supreme Court in the case above cited, upon the very reason embodied in the opinion and syllabus of that decision.

In addition to this fact, however, In Re Preston cannot be regarded as controlling the instant case with respect to the interpretation and application of the Ohio Constitution, for the reason that constitution itself has been materially changed since that case was decided. We refer the court to Sections 34 and 36 of Article II of the Ohio constitution as adopted in November, 1912, and effective June 1, 1913. They are as follows:

> Section 34. "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees, and no other provision of the constitution shall impair or limit this power."
>
> Section 36. "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may eb exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods

of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

We submit, upon the reasoning embodied in the decision in the McLean case, which is sufficient for that purpose, that the main features of the Ohio law (which are the only ones which could possibly be affected by the decision in the Preston case, for reasons which have already been pointed out) constitute a law for the "general welfare" of the employes in operating mines within the meaning of Section 34 of the constitution.

Counsel are unable to destroy the force of this point by what they say at pages 52 to 54, inclusive, of their brief. Their argument, reduced to the simplest terms, is merely that the plain purport of the constitutional provision is to withdraw the conflicting rights of others than employes from the protection of the bill of rights of the Ohio Constitution; but that this could not be the case because that would be a "monstrous supposition". "Monstrous" though the supposition may be, it is impossible to avoid the interpretation of the Ohio Constitution which counsel themselves tacitly acknowledge is the primary meaning thereof.

But we prefer to base our claim for special legislative power to enact a law of the kind, despite the previous decision in the Preston case, upon the rather more explicit language of Section 36, and particularly the last clause thereof. Counsel have complained throughout their brief that in effect the Ohio legislation regulates the methods of mining and **pro tanto** interferes with a private business. Here we find that so far as the Ohio Constitution is concerned the legislature of the

state is given explicit power to regulate the methods of mining.

There are two ideas contained in the entire Section 36. One is the idea of conservation and the other is the explicit grant of power to regulate certain businesses. There may be, however, a relation between the two. We may briefly develop them together.

We say that the latter part of Section 36 furnishes explicit and direct authority for legislation of this kind in a palpable effort to avoid the consequences of the decision in the Preston case. We do not acknowledge that the Ohio Constitution is even doubtful of import on this point, but if it is doubtful, then, upon principles which are well understood, we beg leave to submit the following quotation from the Debates of the Constitutional Convention of 1912, which framed Section 36 of Article II:

> "Mr. Tetlow: Believing that this convention has reached a stage in its proceedings when we should have more action and less words, I have condensed into a few words my views on the question now under consideration.
>
> "The subject matter contained in this substitute proposal is of great import to this great commonwealth and will grow in magnitude with each passing year, and I feel that we living in this age owe to the coming generations the preservation of our natural resources, that fundamentally belong to them as well as to us. This proposal, if adopted, will give the law-making power of the state authority to provide for the conservation of all our natural resources, to adopt and regulate systems of mining that will tend toward the preservation of life, prevent the waste of minerals and provide for the measuring of coal. The principal mineral of this state and nation is coal, and being familiar with that industry I shall illustrate from that standpoint. The

natural resources of this nation have been chiefly responsible for its wonderful progress, and coal has contributed most largely to its success. * * * The production of coal in the United State from 1814 to the close of 1910, including anthracite and bituminous coal, was 8,243,351,259 tons, and according to Dr. J. A. Holmes, director of the national bureau of mines, we have lost, never to be recovered, by our wasteful and destructive methods of mining approximately 5,000,000,000 tons of coal, and from my personal knowledge of mining conditions I know we lost about 40 per cent. through our national methods of mining. Consequently I feel that Dr. Holmes in his estimate of loss is approximately correct. Since 1872 Ohio has produced approximately 600,000,000 tons of coal, and at the rate of loss indicated our loss in this state will approximately be 240,000,000 tons. Ohio produced in 1910, 34,424,951 tons. In 1911 the Ohio tonnage was 30,342,039 tons. At the same ratio of loss in the last two years, Ohio lost over 25,000,000 tons that can never be recovered.

"In European countries and under their system of mining over 90 per cent. of the coal is mined and consequently less than 10 per cent. is lost, which shows conclusively our weakness, and it also reflects discredit upon the system we employ.

* * * * * * * * * * *

"In speaking of the great loss of human life in our mining industry I do so with deep and mingled feelings; and many, many times have these words burned into my very soul that 'man's inhumanity to man makes countless thousands mourn.' Yes, my friends, I have spent my entire life in and around the mines, and I have seen hundreds of my fellow workmen go to needless and untimely graves, but with all that I haven't yet lost faith in mankind, and when the time comes that human life is placed above dollars justice will begin to reign.

* * * * * * * * * * *

"I submit for your consideration a brief statement of the mortality in the mines.

* * * * * * * * * * *

"In European countries the mines are worked principally on what mining men term 'long-wall advancing' or 'long-wall retreating.' By this system practically all the coal is taken out and the traveling and hauling roads are protected by artificial walls built of rock or slate, the old workings of the mines are quickly closed by the pressure and weight of the overlying strata and it leaves no space in the old abandoned workings for the accumulation of gas or coal dust.

"In this country the principal method used in mining is known as the 'room and pillar' system. About 60 per cent. of the coal is mined by this process and about 40 per cent. that is not recovered is used for pillars, which in the end is false protection, because in the old abandoned workings a condition is created that is dangerous. Proper ventilation is rendered impossible and the old and abandoned workings become a storage place for gas or coal dust, which all the elements that cause all of our mine explosions.

* * * * * * * * * * * *

"In dealing briefly with mine explosions I desire to make in the beginning the unqualified statement that every one of the catastrophes due to explosions could be prevented. As I heretofore stated, there were two elements that furnished the basic cause of explosions, inflammable gas and coal dust. The inflammable gas encountered in mines, known as marsh gas or commonly called fire damp, creates its greatest destructive powers when the atmosphere becomes charged with about seven per cent. of the gaas. When the percentage of gas is below three per cent. it will not ignite. Consequently if the sections of the mines are properly ventilated gas can be diluted and rendered harmless and driven from the mine. Coal dust is more dangerous and deadly than gas because it is more difficult to remove, but if the mines in the dry sections are sprinkled and the air currents charged with moisture by artificial means, or the dust is removed, the danger could be eliminated. The greatest handicap in proper ventilation and cleansing dust from the mine to protect life and

property is our present 'room and pillar' system. If we adopt European methods we will be able to more adequately protect life and conserve our mineral resources. I recognize that the one great crying need in the mining district is national regulation to circumvent the stone-age cry of competition that arises when a single state attempts to rectify existing wrongs. **My reason for wanting a constitutional provision giving authority to enact laws regulating the measuring and weighing of coal is to protect life and prevent fraud.** For many years the miners have endeavored to have their employers pay them upon the basis of 'mine-run,' or for all the coal they produce, but they have never succeeded, and they, in their weakness, have been denied justice by the strong. At present the miners of the state are paid only for coal that passes over a screen having an area of 72 superficial feet, with a mesh supposed to be an inch and a quarter between the bars, and the amount of nut coal and slack passing through the screen will average about 35 per cent.

"One thing about these screens that is self-evident is that the coal passing over and through them wears the bars and increases the size of the mesh. Thereby injustice is done for the wearing of the screen never favors the miners. From personal observation I have seen screens so worn that the miners were losing fully 10 per cent. of earnings that rightfully belonged to them. You may ask why the miner would permit such a condition, but he usually suffers in silence for fear of discrimination. So with all his latent slumbering power he is oppressed through his own weakness.

"In 1898 a law was passed in this state 'to provide for the weighing of coal before screening' for the protection of miners, but it was declared unconstitutional by our Supreme Court, while the same kind of a law has been held constitutional in West Virginia, Kansas and Illinois. The Ohio court held that the law was an unwarranted invasion of the right of contract and that it placed a premium upon incompetency. I contend that our state has, under its legislative branch of government, the right to

regulate the conduct of its citizens toward each other and the manner in which they shall use their property when the regulation of such is necessary for the public good.

"If there were any basis for the action of the court in declaring that the law placed a premium upon incompetency at that time that claim cannot be raised now, because a complete evolution has taken place in the industry. At that time the great majority of our tonnage was produced by the hand-pick method, and there being no sale for fine or slack coal, the employers took exceptional care in selecting practical workmen because the less fine coal produced the greater returns on their investment. The present conditions are directly opposite. Of the 34,424,951 tons produced in our state in 1910, 30,083,468 tons was mined by machinery, so that the machine now does the under cutting that required the practical miner in the past. The fine coal has become a valuable commodity, due to the patent stokers and modern methods of extracting the head units from fine coal, and the more fine coal produced the more goes through the screen and the greater become the returns of the employer. In the past the practical miner was in demand; now the inexperienced miner who produces the most fine coal is in demand.

"Right here I desire to make a statement that in Illinois and West Virginia, where they have the mine-run system and where the miners are paid for all the coal they mine, they have increased their tonnage production to a greater extent than any other states in the Union in the last decade.

* * * * * * * * * * *

"All we ask is that we be paid for that which is marketable coal, coal which can be sold in the market. There is no reasonable objection to the proposition, and it will not prevent the operator from screening the coal and making different grades to meet market requirements.

"Mr. Hoskins: Is there any provision in the present constitution under which these regulations cannot all be made by statute?

"Mr. Tetlow: Because the Supreme Court in this state decided in 1900 that it was an invasion of the right of contract and that it set a premium upon incompetency. But conditions have changed and I am satisfied if our court today had to rule upon the same question it would hold it constitutional because of these changed conditions. Practically all of our coal at that time was mined by the hand-pick method. There was not any sale for fine coal, only for lump coal, and the fine coal was lost, but conditions have changed. Patent stokers have come into use. Fine coal is marketable; in fact if you go into some of the state institutions of this state you will find they are using fine coal the miners do not get paid for."

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(Remarks of Mr. Percy Tetlow, delegate from Columbiana county, in the Constitutional Convention of Ohio, Wednesday, April 17, 1912. Proceedings and Debates, Vol. II, pp. 1280, 1281.)

If this court were an Ohio court, we would ask it to take judicial notice of what is a fact well known in Ohio, viz., that Section 36 or Article II was discussed by the people, when it was before them for adoption or rejection, upon the understanding that it would make possible the enactment of what was popularly termed an "anti coal screen law." Is it not at least significant, that, as shown by the resolution authorizing the appointment of the Coal Mining Commission, above cited and referred to, one of the very first bills introduced into the first session of the General Assembly of Ohio, following the adoption of the constitutional amendments, was a bill relating to the method of weighing coal at the mines when the employes are to be paid for their labor on the basis of weight or other quantity?

So, we say that Section 36 of Article II, on its face, grants **special** authority to the Ohio legislature to pass

an act of this character and changes the constitution from what it was when the Preston case was decided; and that this was the general and popular understanding of the purport of this provision when it was submitted to the people for their adoption or rejection.

With respect to conservation, the intent of the whole section is very clearly expressed. Water power, coal, oil, gas and other minerals are regarded as "natural resources" which are to be conserved. Conservation is to be by way of "the regulation of methods of mining, weighing, measuring and marketing" the minerals mentioned. It is probably true, as counsel insist at page 54 of their brief that the laws to be passed for this purpose must have regard to the constitutional rights of the proprietors of such resources, but these very constitutional rights themselves are always subject to the social interests, as Article I, Section 19 of the Ohio Constitution provides that "private property shall ever be held inviolate but subservient to the public welfare."

What Article II, Section 36 of the Ohio Constitution does is to declare the public interest in the natural resources of the state. As pointed out in German Alliance Insurance Co. v. Lewis, supra, the degree of the public interest in property or business of a given kind may change; and in the course of time and the development of the social order the public interest may tend to become in new respects paramount to the private interests.

Absolutely to deprive the owners of valuable property without compensation under the guise of conserving natural resources is one thing; regulating, in the interest of the public, the use of property which constitutes a natural resource, so as to deprive the owners of mere

incidental property rights, is an entirely different thing, as pointed out in the Opinion of the Justices (Maine, 1908), 69 Atlantic, 627, 19 L. R. A. n. s., 422. The present Ohio statute controls and regulates the operation of coal mines, to give it the extreme effect contended for by appellant. It does not deprive the owners of coal mines of their general property in the mines or in the coal in place; nor, except in a very limited sense, does it interfere with the management of the business of mining coal or with the **jus disponendi** attaching to ownership of the coal. Therefore, it seems to us that, accepting counsel's interpretation of Article II, Section 36 of the Ohio Constitution, the present act constitutes a direct exercise of the special legislative power provided for therein.

The court will presume, of course, that **some change** was intended by the people of Ohio when they adopted this section. Hence, it stands to reason, we think, that In Re Preston, supra, even if it were not distinguishable on grounds hereinbefore discussed from the present case, cannot be regarded as an interpretation of the Ohio Constitution as it is today in its application to legislation of this sort.

Generally, on the question of the right of the state to conserve its natural resources, we cite West v. Kansas Natural Gas Co., 221 U. S., 229, wherein the court, speaking through Mr. Justice McKenna, says:

> "The right of the state 'to preserve the common supply (of natural gas) for the equal use of all owners' is not denied by appellees. We put the question out of consideration therefore, except incidentally, and concede the right of the state to preserve the supply of gas."

There is another line of decisions of this court, which, while not directly involving the idea of conservation of natural resources, do involve the principle that regulation of private property rights not amounting to a direct taking of the property itself is sanctioned under the police power.

Barrett v. Indiana, 229 U. S., 26, 29.
Ohio Oil Co. v. Indiana, 177 U. S., 190.
Hudson Water Co. v. McCarter, 209 U. S., 349.
Wilmington Star Mining Co. v. Fulton, 205 U. S., 60.

Further, as to the distinction between a "comparatively insignificant taking of private property" and a substantial expropriation, see Noble State Bank v. Haskell, supra, at page 110.

Of course, we would not contend that the State of Ohio could by direct constitutional provision, any more than by legislation, take private property without compensation to an extent not justified by the public welfare, but in this case (always assuming that there is an actual taking of private property, which we question) the property right taken by the state is insignificant, the public interest in the supply of coal in place is demonstrable from the facts found by the Ohio Coal Mining Commission and is recognized and made paramount **to the extent, at least, to which it is asserted as such** through the act here involved, by Article II, Section 36 of the Constitution of Ohio.

We submit, therefore, that In Re Preston, supra, in so far as it might be considered as a case supporting the contention of appellants (and it does not seem to us to support their contention) is not an authoritative inter-

pretation by the highest court of Ohio of the meaning and application of the Ohio Constitution. We also submit (having discussed the two questions together) that the extent to which (if at all) the Ohio law involved in the present case takes private property, is no greater than that to which the legislative power of the state extends when asserted in order to conserve the natural resources of the state, the exhaustion of which, under the methods of production heretofore in vogue, can be clearly foreseen.

For a discussion of other points raised by the bill but not dwelt upon in appellant's brief, under the Constitution of Ohio, we refer this court to the opinion of the court below. Indeed, upon all points in the case with the exception of one or two, which we have raised for the first time in this court, we think the opinion of the District Court is convincing and conclusive.

CONCLUSION.

We have tried, in the foregoing brief, to establish the following points, which, as we summarize them, we submit to the court:

1. In so far as the Ohio law enjoins upon the mining industry of the state the use of the mine-run system of compensation, it is sustained as against objections made under the Fourteenth Amendment of the federal constitution, on the authority of McLean v. Arkansas, supra.

2. The appellant being a corporation cannot be heard to complain of any supposed deprivation of liberty of contract, through the peculiar features of the Ohio law.

3. Sections 2 and 3 of the Ohio law and the other provisions thereof are dependent upon them do not in a real sense deprive the coal operators of property.

4. The alleged deprivation, whether of property or liberty, involved in the sections of the Ohio law above referred to is unreal and illusory and the coal operators have no cause for complaint under the Fourteenth Amendment on account of the effect of the law upon their property and business.

5. The objections made in the appellant's brief to the peculiar features of the Ohio law are not well taken.

6. Sections 2 and 3 of the Ohio law and the other provisions dependent upon them constituting the features peculiar to that law, as compared with the Arkansas statute sustained in the McLean case, are appropriate and necessary incidents to the accomplishment of the main purpose common to both acts, in that they aim to avoid real public evils attendant upon legislation of this general character, and constitute the only effective means of avoiding such evils; nor are these provisions more conventionally compulsive in character than the evils to be remedied require.

7. The business of coal mining, under the facts developed in the inquiry out of which the Ohio legislation grew, has become charged with a public interest.

8. The penalties imposed by Section 6 of the act are not excessive; nor is the question of penalties properly made in this case.

9. The sections complained of by appellant do not embody any delegation of legislative power.

10. The early decision of the Ohio Supreme Court in the case of In Re Preston, supra, is not an interpretation

of the present Ohio Constitution; nor is the act involved in the case at bar subject to the criticisms made by the Ohio court in the Preston case against the act then before that court.

11. The constitutional amendment which has obviated the application of In Re Preston, declares the policy of the state with respect to the conservation of its natural resources; while the act questioned in this case, being merely regulatory in character, goes no further than the legislative power of the state may proceed in the accomplishment of this purpose.

While we have argued the questions involved in this case at some length in this brief, we feel that the previous decisions of this court so far rule the case at bar as in fact to make these questions **frivolous**, within the meaning of the rules of the court. That every intendment favors the constitutionality of a statute, is a principle so well established as to need no citation of authorities. In the case at bar, however, the presumption hardly need be brought to the support of the legislation of Ohio; for no objection is made to its constitutionality that is not fully disposed of by some previous decision or else is not wholly unsupported by reason or authority.

We respectfully submit that the decision of the District Court should be affirmed.

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